Supreme Court, U.S.
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No._____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

OSCAR B. GOODMAN,
Witness-Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR CERTIORARI

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52 pp

QUESTIONS PRESENTED

Whether, absent any "crime fraud exception", a lawyer may be compelled to disclose client fee information, in violation of Nevada court rules (adopted as the federal court's local rules) forbidding the revelation of such client information?

Whether a lawyer may be compelled to provide a grand jury with client fee information against his or her client, in the very proceedings the lawyer has been hired to defend, despite the prosecution's candid acknowledgement that such information is "critical evidence going to the heart of the Government's case", and thereby supplying the "last link" in an existing chain of incriminating evidence likely to lead to that client's indictment?

Whether the tension created between a grand jury subpoena requesting client fee information and an Internal Revenue Service threat to impose a massive civil fine with respect to the filing of a Form 8300 regarding that fee violates the Eighth Amendment's prohibition against excessive punishment?

PARTIES TO THE PROCEEDING

In addition to the parties named in the style of this case Natale Richichi is a party.

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PETITION FOR CERTIORARI

The Petitioner Oscar B. Goodman respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above proceeding on June 13, 1994.

REFERENCE TO OPINIONS IN THE CASE

The judgment and opinion of the Ninth Circuit Court of Appeals is ***In re Grand Jury Proceedings (Goodman)***, No. 9-15830, slip op. (9th Cir. June 13, 1994) appendix p. 8a. The order of the District Court is ***In re Special Grand Jury Proceedings***, No. CV-S-94-312-PMP (LRL) slip op. (D. Nev. April 26, 1994)[sealed order] appendix p. 3a.

GROUNDS FOR JURISDICTION

This Court has jurisdiction to issue a writ of certiorari in this case under 28 U.S.C. § 1254.

STATEMENT OF THE CASE

WITH BASIS FOR JURISDICTION IN THE COURT OF FIRST INSTANCE

This petition seeks review of the Ninth Circuit's affirmance of the District Court order holding an attorney, Oscar B. Goodman, in contempt for refusing to disclose "information relating to his representation of a client" to a federal grand jury, despite a State Ethical code prohibiting the disclosure of such client confidences and the prosecutor's admonition that such client fee information constituted "critical evidence going to the heart of the government's case" against his client in the very proceedings he had been hired to defend.

The District court had jurisdiction of this case pursuant to 28 U.S.C. § 1826 (a). The Ninth Circuit Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 1826(a) from an order of the District Court holding Petitioner in contempt. Petitioner filed his timely notice of appeal on the same date he was held in contempt. Mr. Goodman has been released on his own recognizance pending full review of the District Court's order.

The Petitioner, Mr. Oscar Goodman, a law partner in the firm Goodman and Chesnoff, and former President of the National Association of Criminal Defense Lawyers, has defended citizens accused of criminal offenses for the past thirty years.

Oscar Goodman's representation of Natale Richichi began Febuary of 1993. Goodman represents Richichi in two separate indicted cases, one in the District of Nevada and

another in the Southern District of Florida, as well as before the very Nevada grand jury to which he has been subpoenaed.

Petitioner seeks review of the order of contempt before the grand jury in the Nevada case.

Mr. Goodman's client, Richichi, was indicted for the offense of bribery. ER 1-5. The Florida case was indicted after Mr. Goodman was served with the subpoena but before he was held in contempt by the District Court for the District of Nevada. ER 6, 117, and 121-139.

During the representation of Richichi, Mr. Goodman filed an IRS Form 8300 reporting a payment received on behalf of a client. Mr. Goodman did not report the client's identity, address or taxpayer identification number, relying on the same ethical and constitutional considerations raised by this petition. ER 48.

Thereafter on December 6, 1993 the Government served the firm of Goodman & Chesnoff with a grand jury subpoena seeking some of the same information requested on Form 8300. In addition, the subpoena requested:

> "Any and all records of ***any form of payment received and/or promised*** for legal representation of: NATALE RICHICHI ... from 1 February 1993, to present. ***These records should include, but are not limited to: retainer agreements***; all billings; the date(s), amount(s), and ***means of all payments received; the identity of the person(s) or entities making the payments***; and copies of all checks, money orders, and/or cashier's checks used to make the payments." See: Subpoena ER 6.(emphasis added)

Thus, the subpoena not only sought documents related to the payment of fees, it also required the production of

information which was clearly testimonial in character. In addition to payments actually received, the subpoena sought information regarding payments promised but never paid. The subpoena further required production of the entire retainer agreements and the means of all payments received as well as the identity of the persons or entities making the payments, whether or not they were clients. ER 6.

On April 26, 1994, the District Court ordered Mr. Goodman to comply with the subpoena as written. ER 68-73. On May 3, 1994 Mr. Goodman appeared before the grand jury, and again relying upon the constitutional and ethical grounds raised by this petition, refused to produce the records and testimony. ER 74-77. That same day the Government requested that Mr. Goodman be held in contempt. ER 79-81. On May 13, 1994 the District Court held Oscar Goodman in contempt staying its order of incarceration pending appellate review. ER 111-113 and 117. The Ninth Circuit in ***In re Grand Jury Proceedings (Goodman)***, CV-S-94-312-PMP (9th Cir. June 13, 1994) affirmed the District Court and since has stayed the mandate pending this Petition for Certiorari which seeks review of that order. See appendix at p. 21a.

TIMING OF THE SUBPOENA

Attorney Oscar Goodman has been subpoenaed to testify before a grand jury which is expected to re-indict his client, Natale Richichi, after his client has already been formally charged, and about the very investigation lawyer Goodman has been retained to defend.

LAST LINK

Moverover, the Government has now made clear that the information it seeks from Richichi's lawyer is "critical evidence going to the heart of the Govenment's case" against and apparently necessary for the superseding indictment of him.

ETHICAL RULES

Rule 156 of the Nevada Supreme Court Rules prohibits just such a disclosure, providing in pertinent part that: "[a] lawyer ***shall not reveal information relating to representation of a client...***"(emphasis supplied). See: Nevada Supreme Court Rule 156 [at appendix 17a].

And the Local Rules of the United States District Court for the District of Nevada expressly adopt the "Code of Professional Responsibility and the Model Rules of Professional Conduct" of the "Supreme Court of Nevada", including Rule 156, prohibiting the disclosure of such "information relating to the representation of a client." See: Local Rules of the United States District Court for the District of Nevada [at appendix 16a].

REASONS TO GRANT WRIT

Holding a lawyer in contempt for refusing to disclose client fee information to a federal grand jury, when his own State Ethical Code prohibits the disclosure of any such "information relating to the representation of a client", and when the prosecutor's admonition that such client fee information constituted "critical evidence going to the heart of the government's case" against his client, raises a serious constitutional and ethical dilemma for defense counsel.

By calling an attorney as a witness against his or her own client, the prosecution cuts at the very quick of our adversary system. By creating a conflict which otherwise would not exist, the prosecution deprives the citizen of the counsel of his choice. By seeking such an all-too-convenient short cut, the prosecution undermines the citizen's confidence in his chosen counsel, and the fairness of the criminal justice system as a whole.

The very delicate balance of the adversary process cannot tolerate such intolerance. This Court should grant review.

ARGUMENT
STATE BAR RULES PROHIBIT THE DISCLOSURE OF THIS INFORMATION

The essential importance of confidentiality in the attorney-client relationship has been recognized for centuries and has been described as the oldest of the privileges for confidential communications recognized by the law. Just as importantly, the State Bar codes and rules of professional responsibility protect confidentiality beyond matters encompassed within the evidentiary attorney-client privilege.

The admission of lawyers and regulation of the practice of law has primarily been left to the states.

> "History and policy combine to establish the presence of a substantial state interest in . . . the exertion of disciplinary powers which English and American courts . . . have for centuries possessed over members of the bar, incident to their broader responsibility for keeping the administration of justice and the standards of professional conduct unsullied." ***Cohen v. Hurley***, 366 U.S. 117, 123-124, 6 L.Ed.2d. 156, 162, 81 S.Ct. 954 (1961).

This right to regulate attorney conduct is an aspect of the States' broad powers to protect the public's health and safety, a power that is "especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts'." ***Goldfarb v. Virginia State Bar***, 421 U.S. 773, 792, 44 L.Ed.2d. 572, 588, 95 S.Ct. 2031 (1975).

> "We recognize that the States have a compelling interest in the practice of professions within their boundaries, and that

> as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions." ***Goldfarb v. Virginia State Bar***, 421 U.S. 773, 792, 44 L.Ed.2d. 572, 588, 95 S.Ct. 2031 (1975).

This Court has held that the state function of regulating law practitioners may be interfered with only when the state acts unconstitutionally.

> "[Under] our federal system it is for the States to decide which lawyers shall be admitted to the Bar and remain there; this Court may interfere only if the State's decision is rendered impermissible by the United States Constitution." ***In re Primus***, 436 U.S.412, 440, 56 L.Ed.2d. 417, 440, 98 S.Ct. 1893 (1978) (Rehnquist, J., dissenting).

As this Court very recently reiterated, "[t]here is no federal general common law." ***O'Melveny & Myers v. F.D.I.C.***, No. 93-489, Slip Op. (June 13, 1994)[1]. And this State, through its Supreme Court, has expressly and specifically dealt with the disclosure of such client confidences.

In particular, Rule 156 of the Nevada Supreme Court Rules provides that: "[a] lawyer ***shall not reveal information relating to representation of a client...***". See: Nevada

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[1] Even the Federal Rules of Evidence provide that such rules of attorney-client privilege, not regulated by Constitution, Act of Congress, or other rule "prescribed by the Supreme Court", "***shall be governed by the principles of common law***". See: Rule 501 of the Federal Rules of Evidence.

Supreme Court Rule 156 [at appendix 17a]. The state has chosen to so regulate attorney conduct. Absent some Constitutional constraint same should be controlling.

EVEN GOVERNMENT AGREES WHEN IT SERVES ITS PURPOSE

In a brief recently filed with the Supreme Court of the United States, this same Government argued that "Because of the special status of lawyers in the judicial system, we [Department of Justice] believe that state and ethical codes may constitutionally regulate attorneys" [Brief for the United States as Amicus Curiae, at p. 4, ***Gentile v. State Bar of Nevada***, see appendix p. 18a].

> "A lawyer is not in the same position as a private citizen with respect to the judicial system. Rather, the lawyer has a 'fiduciary obligation to the courts. ...[C]ourts have for centuries possessed authority over members of the bar, incident to their broad responsibility for keeping the administration of justice and the standards of professional conduct unsullied.... [L]awyers must operate as assistants to the court in search of a just solution to disputes." [Brief of the United States as Amicus Curiae, at p. 6, filed in ***Gentile v. State Bar of Nevada***, November 1990, at appendix p. 18a].

CODES OF PROFESSIONAL RESPONSIBILITY ADOPTED AS FEDERAL COURT RULES

At the Federal level, promulgating and enforcing standards of conduct for attorneys is a well established function of local rules. As the court stated in ***Paul E.***

Iacono Structural Engineer Inc. v. Humphrey, 722 F.2d. 435, 438 (9th Cir. 1983), " . . . the district court has primary responsibility for controlling the conduct of attorneys practicing before it." In ***United States v. Klubock***, 832 F.2d. 664, 667 (1st Cir. 1987), the court affirmed the District Court's authority "to control ethical and procedural matters in their forum." See also, ***Addamax Corp. v. Open Software Foundation, Inc.***, 151 F.R.D. 504 (D. Mass. 1993).

District courts traditionally address ethical standards through the adoption of the rules of the state in which they sit. In fact the Local Rules for the United States District Court for the District of Nevada adopt the Code of Professional Responsibility of the Nevada Supreme Court as the ethical rules of that Court, including Rule 156, prohibiting the disclosure of any such "information relating to the representation of a client". See: Local Rules of the United States District Court for the District of Nevada [at appendix 16a].

According to the Federal Judicial Center the local rules for the majority of United States District Courts incorporate or adopt their respective State Bar Codes of Professional Responsibility as ethical standards for attorneys practicing before those courts

As such, these rules become Federal law. In ***United States v. Hvass***, 355 U.S. 570, 78 S.Ct. 501 (1958) the Supreme Court held that a local rule of the United States District Courts for the Northern and Southern Districts of Iowa was a "law of the United States". ***Wirtz v. Hooper-Holmes Bureau, Inc.***, 327 F.2d 435, 438 (9th Cir. 1983)["...the district court has primary responsibility for controlling the conduct of attorneys practicing before it"]; ***U.S. v. Klubock***, 832 F.2d 664 (1st Cir. 1987)[evenly divided ***en banc***]. ***See also***: ***U.S. v. Hammad***, 858 F.2d 834 (2d Cir. 1988) and ***U.S. v. Lopez***, 4 F.3d 1455 (9th Cir. 1993)[both holding that DR7-104(A)(1)(addressing the

propriety of counsel's communication with an individual represented by counsel) was enforceable against federal prosecutors through adoption in the federal district court's local rules].

The canons of ethics have been held to be broader than the traditional evidentiary attorney-client privilege. See, e.g., ***Brennan's Inc., v. Brennan's Restaurants, Inc.***, 590 F.2d. 168 (5th Cir. 1979) (ethical duty to preserve client confidences broader than attorney-client evidentiary privilege; under ethical obligations, attorney must be disqualified even if his continued representation would not require him to violate the attorney-client privilege). And this Court has recognized the central importance of ethical standards in our legal system. See: ***Wheat v. United States***, 486 U.S. 153, 108 S.Ct. 1692 (1988).

In ***Wheat*** the defendant argued that his Sixth Amendment right to counsel of his choice was violated when the district court refused to allow him to waive his right to conflict free representation in order to obtain representation from an attorney who had represented alleged coconspirators. This Court rejected the contention that waivers could cure any problems created by multiple representation. Rather, the Court stated:

> "Federal courts have an independent interest in assuring that criminal trials are conducted within the ethical standards of the profession . . . Both the American Bar Association's Code of Professional Responsibility and its Model Rules of Professional Conduct, as well as the rules of the California Bar Association . . . impose limitations on multiple representation of clients..." ***Wheat v. United States***, 486 U.S. at 160, 108 S.Ct. at 1698.

In that case, enforcement of an attorney's ethical obligations overrode a defendant's constitutionally grounded right to counsel of his choice.

Rule 156 of the Nevada Supreme Court Rules expressly and specifically provides that: "[a] lawyer shall not reveal ***information relating to representation*** of a client..." (emphasis supplied) [at appendix p. 17a]. Attorney Goodman is acting in the best tradition of his profession abiding by those constraints.

LAST LINK

Moreover, the prosecution has candidly acknowledged that the "information subpoenaed from" this lawyer constitutes "critical evidence going to the heart of the government's case" against his client.

The Court of Appeals is correct when it states that fee information is not ordinarily privileged, even though incidentally "it ***may*** evidence wrongdoing by the client", *See: **In re Grand Jury Proceedings (Goodman)***, No. 94-15830 (9th Cir. June 13, 1994) Memorandum Slip Op., p. 7 [at appendix p. 8a], quoting ***In re Osterhoudt***, 722 F.2d 591, 592 (9th Cir. 1983). However, this is not a situation where the incriminating nature of this client information is merely coincidental to the compelled production by the lawyer.

This is a situation where the very "information subpoenaed from th[is] witness is ***critical evidence going to the heart of the government's case***" against the subpoenaed lawyer's client.[2]

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[2] The Government expressly acknowledges that the presentation of the superseding indictment to this grand jury has been delayed in order to compel compliance with the instant subpoena. See: Government's Emergency Motion to Expedite issuance of the Mandate, dated June 23, 1994.

This is a situation where the disclosure of that information by the lawyer would supply the "last link" in an existing chain of incriminating evidence likely to lead to the client's indictment. ***In re Grand Jury Proceedings (Pavlick)***, 680 F.2d 1026, 1027 (5th Cir. 1984) en banc; ***In re Grand Jury Proceedings (Jones)***, 517 F.2d 666, 672 (5th Cir. 1975) ["it may well be the link that could form the chain of testimony necessary to convict an individual of a federal crime"].

This is a situation where the disclosure of that information would be "material ***only*** for the purpose of showing an acknowledgement of guilt on the part of such client of the very offense on account of which the attorney was employed." ***Baird v. Koerner***, 279 F.2d 591, 633 (9th Cir. 1960); ***In re Michaelson***, 511 F.2d 882, 888 (9th Cir.), cert. denied, 421 U.S. 978 (1975).

The fee arrangement between Mr. Goodman and his client, being critical to the prosecution's case against the client for which Mr. Goodman represents him, is information which the client reasonably expected to be kept confidential. The sought after information is not incidental to the reason for obtaining legal advice. Rather it is critical to the adjudication of the issues for which legal advice was sought. Information is privileged "where the person invoking the privilege can show that a strong probability exists that disclosure of such information would implicate that client in the very criminal activity for which legal advice was sought." ***In re Grand Jury Proceedings (Lawson)***. 600 F.2d 215, 218 (9th Cir. 1979), citing ***U.S. v. Hodge & Zweig***, 548 F.2d 1347, 1353 (9th Cir. 1977). Here, the Government candidly acknowledges that the sought after client fee information would not only "implicate the client in the very criminal activity for which legal advice was sought", such information is "critical evidence going to the heart of the Government's case" against attorney Goodman's client.

Here, the client's initial act of producing a fee in the first place was a privileged communication. It says the following "I have this amount of money in this form to pay you for your services." "I am paying you in cash to guard against disclosing to others that I have retained an attorney." It is a communication that would not have been made absent the attorney-client relationship. It is a communication that is made for the purpose of obtaining legal advice. It is a communication which could also furnish a link in the chain of incriminating evidence likely to lead to the client's indictment. See, e.g, ***In re Grand Jury Proceedings (GJ90-2)***, 946 F.2d 746 (11th Cir. 1991).

For the privilege not to protect same would be to ignore the reality that in order to seek advice one must of necessity seek out counsel. If the act of contacting or retaining counsel is deemed incriminatory, but not protected, then knowledgeable clients will refrain from seeking out competent, ethical legal advice and representation in the first place. Therefore, in order to afford the citizenry a meaningful right to seek privileged advice, the law must accord a similar protection to the act of seeking out and retaining counsel to provide that advice.

There is nothing sinister about seeking out or compensating counsel for providing competent legal advise. Unless the citizenry is protected from prosecutorial use of such communicative acts against them, the privileged nature of "advice of counsel" will constitute a hollow fiction.

TIMING IS EVERYTHING

The opprobrium caused by calling a charged defendant's lawyer before a grand jury investigating his client is only further exacerbated by the timing of the events in this cause. Attorney Oscar Goodman has been subpoenaed to testify before a grand jury which is expected to indict his client, Natale Richichi, after his client has already been

formally charged, and about the very investigation lawyer Goodman had been retained to defend. Moreover, the Government has now made clear that the information it seeks from Richichi's lawyer is "critical evidence going to the heart of the Government's case" against, and apparently necessary for the superseding indictment of him.

The spectacle of calling a citizen's lawyer in an ongoing criminal proceeding to testify before a grand jury about matters admittedly relating to that very investigation, undermines a citizen's confidence in his lawyer and the system alike. The timing of the subpoena, during the pendency of the very grand jury investigation and indictment proceedings against which lawyer Goodman was retained to defend, strains the attorney-client relationship, tearing at the very fiber of the adversary process itself.

> "In the instant case, the Government has subpoenaed a defense attorney during the pendency of indictment proceedings. The subpoena here impinges upon the attorney-client relationship and, by diverting attention from the preparation of the client's defense, severely hinders the attorney's effectiveness in representing him. Accordingly, apart from the issue of privilege, the Court would quash the subpoena given the timing of, and circumstances surrounding, its issuance." ***In Re Grand Jury for Attorney, Reyes Requena***, 729 F.Supp. 458 (S.D. Tex. 1989) reversed and remanded as moot on other grounds, 913 F.2d 1118, 1122 (5th Cir. 1990).

The Fifth Circuit agreed that where a lawyer is subpoenaed to testify against his or her client, at the very time the lawyer is representing that client in an "ongoing criminal proceeding", the "timing" of that subpoena alone may warrant quashing same.

> "Few cases are akin to this one in quashing a subpoena because of its timing -- because it forced a criminal attorney to interrupt his representation of his client at the critical post-detention/pre-indictment phase of the case....
>
> In this case, the district court's exercise of its discretion to quash the subpoena because it created a serious interference with Reyes-Requena's Sixth Amendment rights had attached. The prosecution against him was moving swiftly...DeGeurin's representation of Reyes-Requena was effectively stalled during the [period of time] he contested the subpoena... thus, when the District Court quashed the subpoena to DeGeurin, solely because of its oppressive timing, we do not believe that the court abused its discretion." ***In Re Grand Jury for Attorney, Reyes Requena***, 913 F.2d 1118, 1122 (5th Cir. 1990).

Lawyer Goodman is already the attorney of record in the very ongoing criminal proceedings for which the Government seeks his testimony. Courts addressing the issue have repeatedly held that where an attorney is subpoenaed to testify against a client, at the very time he is representing that client in an "ongoing criminal proceeding", the "timing" of that subpoena may of itself warrant quashing same. ***In re Grand Jury Subpoena Duces Tecum Dated January 2, 195 (Simels)***, 767 F.2d 26, 29 (2d Cir. 1985); ***U.S. v. Kovaleski***, 406 F. Supp. 267 (E.D. Mich. 1976); ***In re Grand Jury Matters***, 593 F. Supp. 103, 107 (D. N.H.), ***aff'd***, 751 F.2d 13, 17 (1st Cir. 1984).

In ***In re Grand Jury Subpoena (Legal Services Center)***, 615 F. Supp. 958, 969-70 (D. Mass. 1985) the District Court held that subpoenas were "unreasonable and oppressive in the context of [an attorney's] ... ongoing representation of a client before INS", stressing "the importance that the federal Constitution places upon the right to counsel in criminal prosecutions and the fact that ... the ***timing*** of the subpoenas [may] unduly and unnecessarily burden that right", noting that:

> "...quite apart from any question of privilege, the Court would quash the subpoenas so long as the attorneys are still representing the clients in pending ... matters." ***In re Grand Jury Subpoena (Legal Services Center)***, ***Supra***, at p. 970.

The ***en banc*** Second Circuit spoke to this issue in ***In re Grand Jury Subpoena Served Upon Doe***, 781 F.2d 238, 244 (2d Cir. 1985), ***en banc***, noting that an attorney subpoena infringes upon an accused's Sixth Amendment right to counsel where the lawyer's subpoena is issued ***after*** "judicial proceedings are initiated against" the client.

> "We have followed the Supreme Court in holding that '[a] person comes under the protection of the Sixth and Fourteenth Amendment right to counsel from the moment judicial proceedings are initiated against him, whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.' ...Since adversary judicial proceedings had not been initiated against [the client] at the time of the [subpoena], his Sixth Amendment right to counsel had not attached .... His interest in continuing to be

> represented by his present counsel was not of constitutional dimensions." ***In re Grand Jury Subpoena Served Upon Doe, Supra***, at p. 244.

Here, the Ninth Circuit recognized that the District Court "incorrectly implied that the government can interfere with impunity in the attorney-client relationship before the right to counsel attaches" at indictment. The Court of Appeals nevertheless upheld the order of contempt reasoning that:

> "First, the government used a subpoena duces tecum, directed to Goodman's law firm, not to Goodman personally. ...Second, the government assured the district court that it does not intend to do anything that would force Goodman to withdraw and that it would be willing to resolve the dispute by stipulation if necessary." ***In re Grand Jury Proceeding (Goodman)***, CV-S-94-312-PMP (9th Cir. June 13, 1994) [at appendix p. 3a].

Such reasoning, however, ignores the impact that the timing of an attorney's subpoena may have upon his client and the adversary process as well. Whether addressed to the lawyer or his law office, a subpoena seeking "critical evidence going to the heart of the government's case" from the very law firm a client has hired to defend him, undermines the citizen's confidence in his chosen counsel, and the fairness of the criminal justice system as a whole. Moreover, given the fact that such disclosures would violate the Nevada State Bar's prohibition against revelation of "information relating to the representation of a client", counsel would, of necessity, be operating under the handicap of a potential, if not actual, conflict between defending his

client and the prospect of violating his State Bar ethical rules. ***U.S. v. Greig***, 967 F.2d 1018, 1023-5 (5th Cir. 1992) [counsel held to have "actual conflict of interest" where he "was in the position of simultaneously having to defend" his client on criminal charges and himself for having "violated the Model Code of Professional Responsibility (and) the American Bar Association's Model Rules of Professional Conduct" regarding communications with represented parties].

As the District Court for New Hampshire aptly noted, it is the timing of an attorney's grand jury subpoena to testify regarding a client he was representing in ongoing criminal proceedings which interfered with that judicial process, and violated the client's Sixth Amendment right to effective representation as well.

> "Defendants have cases pending for trial in state court, the same defendants are under investigation in this court.
> "It may appear picayune to the U.S. Attorney, but this court was privy to the trauma, and understandable emotional upset of Attorney Hodes ... when he recited the facts of being served a subpoena...
>
> "The actions of the U.S. Attorney are without a doubt harassing, show minuscule perception of the untoward results not only to those who practice criminal law, but those in the general practice of law as witness the New Hampshire Bar Association as one of the intervenors.
>
> "The use of the phrase chilling effect upon the role of an attorney engaged in criminal defense work by being served a subpoena in circumstances such as this is mild. To permit

it would have an arctic effect with the non-salutary purpose of freezing criminal defense attorneys into inanimate ice floes, bereft of the succor of constitutional safeguards." ***In re Grand Jury Matters***, 593 F.Supp. 103, 107 (D. N.H.), ***aff'd***, 751 F.2d. 13 (1st Cir. 1984).

EIGHTH AMENDMENT DILEMMA

Mr. Goodman and his firm dutifully file Form 8300 as required by the Internal Revenue Service. Mr. Goodman and his firm view their relationship with their clients, Mr. RICHICHI included, as that of a fiduciary in the true meaning of the word. As such Mr. Goodman and his firm resist governmental intrusion into the relationship.

When Mr. Goodman submitted the Form 8300 to the IRS, he did not answer certain questions therein, based on his perception of the attorney-client privilege relationship and State of Nevada Supreme Court Rule 156.[3]

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[3] Mr. Goodman submitted the following information under oath:

"2. This Form is being filed in connection with the receipt of monies from an active client of the Firm. The Firm has been retained in connection with an ongoing criminal matter and the client is presently under indictment and awaiting trial. If the Firm were to disclose certain of the information requested, such disclosure could severely prejudice the client's interests and undermine the Firm's ability to provide effective legal representation to its client. Moreover, the confidentiality of such information is mandated by the attorney/client privilege, the Fifth and Sixth Amendments to the United States Constitution and the Lawyer's Code of Professional Responsibility.

3. Further, numerous local, state and national bar association opinions counsel, on ethics grounds, against the voluntary provision of such information.

Mr. Goodman developed his policy regarding the Form 8300 to accomplish the following specific goals:

> (1) He wanted to deposit the fees he received in a bank account and pay taxes on the fee;
>
> (2) He was aware of the government's interest in investigating "Klein Conspiracies" and did not want to place himself in the position of being the "last link" in an investigation of his clients; and
>
> (3) He believed that clients would consider it a breach of trust and a violation of their "lay" understanding of the attorney-client relationship should Mr. Goodman disclose information about that relationship.

In the instant case, two events overlapped. Mr. Goodman's appearance was scheduled before the grand jury and he received in the mail a demand letter from the Internal Revenue Service directing him to complete the very Form 8300 which memorialized his receipt of fees to represent Mr. RICHICHI. The Form 8300 demanded that Mr. Goodman completed that within thirty (30) calendar days or he would be subject to the imposition of civil penalties and could be assessed "the greater of. . .$25,000. [or] .the amount of cash. . .received in such transaction up to $100,000."

Mr. Goodman, aware of the Doctrine of Waiver, feared that the information in the "judicial" setting of the grand jury could very well be construed as a waiver in the "executive" setting of the Internal Revenue Service.

As a consequence thereof, Mr. Goodman claimed to the grand jury that the Eighth Amendment was directly

---

4. Accordingly, certain information concerning the client has been omitted from the Form." See: Appellant's Opening Brief Recalcitrant Witness Appeal at page 7.

implicated by the subpoena, together with the issuance of the letter from the Internal Revenue Service which threatened civil penalties.

Mr. Goodman asserted the Eighth Amendment privilege as the protection available to him to preserve his privilege with respect to the Form 8300 dispute he has with the Internal Revenue Service. ***See, Minnesota v. Murphy***, 465 U.S. 420 (1984). His assertion of the Eighth Amendment was grounded, ***inter alia***, on the rationale of ***Austin v. United States***, 509 U.S. ____, 125 L.Ed.2d 488, 113 S.Ct. ___ (1993) which held that the excessive fines clause of the Eighth Amendment was applicable in this setting to such civil fines and forfeitures.

The threatened penalty in the Internal Revenue Service letter dated March 22, 1994, had the same punitive markings as the forfeitures contemplated in ***Austin*** and the "marijuana tax" held to constitute "punishment" in ***Department of Revenue of Montana v. Kurth Ranch***, No. 93-144 (decided June 6, 1994) [recognizing that such "fines...are readily characterized as sanctions" for Fifth Amendment double jeopardy purposes].

Petitioner's fear is real. He, like many attorneys across the country, who receive cash fees from their clients, dutifully and ethically files Form 8300s reporting the transaction. The letter from the Internal Revenue Service cited to the Petitioner as a warning the following cases: ***U.S. v. Goldberger and Dubin***, 935 F.2d 501 (2nd Cir. 1992) and ***U.S. v. Leventhal***, 961 F.2d 936 (11th Cir. 1992) in support of their threatened punitive fines.

Lawyer Goodman has a legitimate concern that to comply with the grand jury subpoena may invoke discipline by his State Bar and massive fines by the IRS. To refuse, will only invite the promise of incarceration and fine. Such harsh punishment for a conscientious lawyer's honest ethical dilemma, raises the spectre of the Eighth Amendment's prohibition against excessive fines.

CONCLUSION

Forcing disclosure of fee information in this case will have the effect of jeopardizing this client's, and other similarly situated individuals', ability to retain counsel without simultaneously giving the prosecution critical evidence in its case against them.

> "The Government would place chilling consequences on the very act of obtaining legal advice." *In re Grand Jury Subpoena (Reyes Requena)*, 926 F.2d 1423, 1432 (5th Cir. 1991).

The spectacle of calling a citizen's lawyer as a witness against his own client in an ongoing criminal proceeding to testify before a grand jury about matters admittedly "critical to" the indictment against which he had been retained to defend, tears at the very fabric of the adversary system, and threatens to topple its delicate balance, by placing in the hands of one side of the conflict the ultimate weapon of eliminating his or her adversary's advocate.

The writ for certiorari should issue.

Respectfully Submitted,

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617-542-6663

BY:_____
Gerald Harris Goldstein

APPENDIX A

United States District Court

DISTRICT of NEVADA

TO: Goodman & Chesnoff
A Professional Corporation
520 South Fourth Street
Las Vagas, Nevada

SUBPOENA TO TESTIFY BEFORE GRAND JURY

Attn: Custodian of Records

SUBPOENA FOR

☐ PERSON ■ DOCUMENTS(S) OR OBJECT(S)

YOU ARE HEREBY COMMANDED to appear and testify before the Grand Jury of the United States District Court at the place, dates, and time specified below.

Place:	Court
Foley Federal Building Room 2036 300 Las Vegas Boulevard, South Las Vagas, Nevada 89101	Grand Jury Room
	Date 18 Jan 94 9:00 a.m.

YOU ARE ALSO COMMANDED to bring with you the following documents or objects:

Any and all records of any form of payment received and/or promised for legal representation of: NATALE RICHICHI, NANCY ALSA, CARMELLO RICHICHI, AND CAROL RESNICK from 1, February 1993, to present. These records should include, but are not limited to: retainer agreements; all billing; the date(s), amount(s), and means of all payments received; the identity of the person(s) or entities making the payments; and copies of all checks, money orders, and/or cashier's check used to make the payment.

IN LIEU OF PERSONAL APPEARANCE, THESE RECORDS MAY BE TURNED OVER TO ANY DULY AUTHORIZED FEDERAL AGENT OR REPRESENTATIVE, OR MAILED VIA CERTIFIED MAIL TO 300 SOUTH FOURTH STREET, SUITE 1005, LAS VEGAS,

NV 89101.

If you have any questions regarding this subpoena, please contact the attorney listed below at the Organized Crime Strike Force. 702-388-6363

☐ please see additional information and revisions

This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

Clerk
CAROL C. FITZGERALD

By Deputy Clerk
S/ Fay McMullen

This subpena is issued on application of the United States of America

JMS:pcf:FBI/ck:91R0544/92-461

name, address, and phone no. of
Assistant U.S. Attorney
Jane Hawkins Dominion
Assistant United States Attorney
Organized Crime Strike Force
300 South Fourth Street, Suite 1003
Las Vagas NV 89101 (702) 388-6363

APPENDIX B

ENTERED
SERVED
APRIL 26 1994

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

IN RE SPECIAL GRAND JURY PROCEEDINGS	) C V - S - 9 4 - 3 1 2 -)PMP(LRL))) SEALED) ORDER

_____)

Before the Court is a motion for Order to Show Cause (#1), filed by the Government on March 28,1994, and a Memorandum of Points and Authorities (#6) filed on April 8, 1994, in support of its Motion for Order to Show Cause. Respondent Oscar B. Goodman ("Goodman") filed Opposition (7) on April 15, 1994, and the Government filed its Reply on April 19,1994. The Court heard oral argument on this Motion on April 19,1994.

On December 6, 1993, the law firm of Goodman & Chesnoff was served with a Grand Jury subpoena. The subpoena commanded the Goodman firm to produce "all records of any form of payment received and/or promised for legal representation of Natale Richichi, Carol Resnick, Nancy Alba, or Gustave Alba." The subpoena listed as examples of such records:"retainer agreements; all billings; the dated, amounts and means of all payments received; the identity of the persons or entities making the payments; and copies of all checks, money orders, and/or cashier's checks used to make the payments." See Subpoena, Exhibit A,

attached to Government's Motion of Order to Show Cause (#1).

Three and one half months later, in March 22, 1994, Goodman appeared before the Grand Jury as custodian of records of the Goodman & Chesnoff law firm. At that time, he refused to produce the requested records, asserting a claim of privilege under both the Sixth and Eighth Amendments. Goodman specifically stated that he was not invoking his Fifth Amendment privilege against self-incrimination.

At oral argument, Goodman acknowledged that the firm may possess documents relating to fees received while representing Carmello Richichi, Carol Resnick, Nancy Alba, or Gustave Alba. Goodman noted that the documents pertained to land used as security for attorney's fee by a corporation in which some or all of the above named parties held an interest. Goodman assured counsel for the Government and this Court that if his firm had such documents, he would turn them over in compliance with the subpoena. Goodman noted further that there were no other documents in his firm's possession relating to fees for legal representation of Carmello Richichi, Carol Resnick, Nancy Alba, or Gustave Alba. Thus, the Court is left to consider Goodman's assertions of privilege as they pertain to Natale Richichi.

The Court finds that the Eighth Amendment provides no support for Goodman's assertion of privilege. Goodman raises the Eighth Amendment as it pertains to the filing of an Internal Revenue Service Form 8300. Goodman filed a Form 8300 in relation to fees received in connection with his firms representation of Natale Richichi, but omitted certain identifying information about Richichi. The IRS sent Goodman a letter demanding he disclose the omitted

information, and noting that Goodman could be fined up to $100,000 if he failed to comply. Goodman argues that this fine is "punishment" from which the Eighth Amendment provides protection.

Whether the Eighth Amendment protects Goodman from penalties the IRS may seek to impose for failing to fully comply with Form 8300 requirements is an issue unrelated to whether Goodman must comply with the Grand Jury's subpoena. The Court finds that the Eighth Amendment is not implicated by the subpoena in the case at bar, and the Court finds that it does not provide Goodman a basis for refusing to reveal the information sought by the subpoena.[1]

The Court also finds that the Sixth Amendment does not provide Goodman with a basis for noncompliance with the subpoena. Goodman argues that if forced to turn over the documents requested by the Grand Jury, he may become a witness at later proceedings, and then would have a conflict of interest with Richichi. Goodman contends that as a result of complying with the subpoena, he would be precluded from representing Richichi, thereby violating Richichi's Sixth Amendment right to counsel. Goodman's argument, though not frivolous, is not supported by the weight of authority in this Circuit.

In Tornay v. United States, 840 F.2d 1424, 1429 (9th Cir. 1988), the Ninth Circuit noted that "we do not agree that compelling an attorney to disclose fee information,

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[1] At oral argument, it was proposed that Goodman turn over the documents to the Court in camera to aid the Court in its decision, with the understanding that the documents would become part of the sealed file. Pursuant to a letter dated April 20, 1994, Goodman advised the Court that he chose not to turn over the documents to the Court in this manner, because he feared that to do so might make it easier for the IRS to obtain the information sought by way of Form 8300.

before adversarial judicial proceedings have been initiated, violates the right to counsel." That court concluded that the appropriate time to bring such a Sixth Amendment challenge would be at trial. Id.

In this case, Richichi is already under Indictment. The Supreme Court, however, has noted that although the Sixth Amendment right to counsel attaches when a person is formerly charged with a crime, it does not attach to the area where that person is also under investigation for another crime. See, e.g., Moran v. Burbine, 475 U.S. 412, 431 (1985) ("the Sixth Amendment right to counsel does not attach until after the initiation of formal charges").

At oral argument, Government counsel represented that the Grand Jury's subpoena directed at records concerning Natale recognized in Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960), insulates him from having to comply with the Grand Jury's subpoena. This doctrine applies "only when it is shown that, because of exceptional circumstances, disclosure of the client's identity or the existence of a fee arrangement would reveal information that is tantamount to a confidential professional communication." Tornay, 830 F.2d at 1428. Because Goodman has disclosed the identity of his client, Natale Richichi, the Court addresses the doctrine only as it may apply to the existence of exceptional circumstances that might compel this Court to apply the last link doctrine,[2] nor is there anything in the circumstances of

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[2] Furthermore, Goodman's reliance on United States v. Hodge & Zweig, 548 F.2d 1347,1353 (9th Cir. 1977), is misplaced, as the Torney court specifically noted that "Hodge & Zweig has been criticized as misstating the Baird rule," Torney, 840 F.2d at 1428, and that "we view Hodge & Zweig's statement of Baird as dictum, and give it no precedential weight." Id.at 1427; See also In re Osterhoudt, 722 F.2d 591, 593 (9th Cir. 1983)("Appellant's confusion as to the meaning of the exception is based upon a misstatement of the Baird rule in subsequent opinions").

this case to suggest that the information sought by the Government "would in any way convey the substance of confidential professional communications between appellant and his attorney." Osterhoudt, 722 F.2d at 594.

IT IS THEREFORE ORDERED THAT the Government's Motion for Order to Show Cause (#1) is granted, the claims of privilege asserted by Goodman and Chesnoff are overruled, and the law firm of Goodman and Chesnoff is ordered to forthwith comply with the Grand Jury subpoena.

DATED: April 26, 1994

/s PHILIP M. PRO
PHILIP M. PRO
United States District Judge

APPENDIX C

FILED
JUN 13 1994
CATHY A. CATTERSON CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE GRAND JURY PROCEEDINGS	No 94-15830
	D.C. No.
OSCAR B. GOODMAN, Witness-Appellant,	cv-s-94-312-pmp
vs.	
	MEMORANDUM*
UNITED STATES OF AMERICA, Appellee.	

Appeal from the United States District Court
for the District of Nevada
Philip M.Pro, District Judge, Presiding

Submitted June 7, 1994 **

Before: TANG, FREGERSON and T.G. Nelson, Circuit Judges

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3.

** The panel unanimously agrees that this case is appropriate for submission without oral argument pursuant to Fed. R. App. P. 34(a) and Ninth Cir. R. 34-4.

Oscar B. Goodman appeals the district court's judgment of contempt for his refusal to produce records pertaining to fee information and arrangements for the legal representation of Natale Richichi.[1] We have jurisdiction under 28 U.S.C.§§ 1291 and 1826(a). We review the district courts adjudication of civil contempt for abuse of discretion, In re Grand Jury Proceedings (Lahey). 914 F.2d 1372, 1373 (9th Cir. 1990) per curiam), and we affirm.[2]

A witness who refuses without just cause to comply with an order of the court to testify or produce documents before the grand jury may be held in civil contempt. 28 U. S.C. § 1826.

Eighth Amendment

Goodman contends that his compliance with the grand jury subpoena would violate his Eighth Amendment right to

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[1] The original grand jury subpoena required Goodman to produce "all records of any form of payment received and/or promised for legal representation of Natale Richichi, Carmello Richichi, Carol Resnick, Nancy Alba, or Gustave Alba . . . . [t]hese records should include, but are not limited to: retainer agreements; all billings; the date(s), amount(s), and means of payments received; the identity of the person(s) or entities making the payments; and copies of all checks, money orders, and/or cashier's checks used to make payments." Goodman only challenges the request for fee information in connection with his representation of Natale Richichi.

[2] The motion of the National Association of Defense Lawyers and the California Attorneys for Criminal Justice, to file a joint brief of amici curiae in support of appellant, is granted and the brief is ordered filed.

be free from excessive fines.[3] Specifically, Goodman appears to claim that by complying with the grand jury subpoena to produce fee records, he would be forced to reveal the fact that he did not complete Form 8300 as required, thereby subjecting him to substantial fines pursuant to Internal Revenue Service Code § 6050-I.[4] However, by virtue of the March 16, 1994 letter from the Internal Revenue Service (IRS) to Goodman, it is clear that the IRS is already aware that Goodman has failed to entirely complete Form 8300.

Goodman also appears to claim that his compliance with the grand jury subpoena would constitute a waiver of his Eighth Amendment protection in the event that the IRS initiates enforcement proceedings against him. This contention is without merit.

First, the Eighth Amendment is not applicable until there has been a formal adjudication of guilt in accordance with due process of law. See Ingraham v. Wright, 430 U.S. 651, 671-72 n. 40 (1977). Here, Goodman's argument is speculative and premature. It assumes that the IRS will initiate civil enforcement proceedings against him and impose a fine. See id. The time to raise the issue of an Eighth

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[3] The Eighth Amendment provides that "[e}xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

[4] Section 6050-I requires anyone engaged in a trade to complete and file Form 8300 whenever a business accepts $10,000 or more in cash payments for services.

That section provides that failure to complete Form 8300 could result in a fine of up to $100,000.00 for failure to comply. Goodman's contention rests on his potential civil liability from the Internal Revenue Service for his failure to disclose his client's identity on Form 8300.

Amendment violation of his right to be free from excessive fines is after the imposition of such a fine. See id.

Second, Fed. R. Crim. P. 6(6) prohibits the disclosure of information obtained during a grand jury investigation for use in civil proceedings without a court order authorizing such disclosure. Therefore, the IRS would not be automatically entitled to information obtained by grand jury.

Third, this court has generally found that before a defendant is deemed to have waived a right, the court must be convinced that the waiver was made intentionally and expressly. Adamson v. Ricketts, 789 F. 2d. 722, 727 (9th Cir. 1986) (citing United States v. Anderson, 514 F. 2d 583,586 (7th Cir. 1975)). Here, even if the Eighth Amendment did apply, it is clear that Goodman has not intentionally nor expressly waived his Eighth Amendment protection, and his compelled production of information before the grand jury does not constitute a waiver. See id.

Accordingly, we find that Goodman's refusal to produce records or to testify regarding records pertaining to fee arrangements for representing Natale Richichi on the basis of the Eighth Amendment has no bearing on the grand jury's inquiry. The district court's finding is supported by a reasonable view of the record. See United States v. Twine, 853 F.2d 676, 681 (9th Cir. 1988).

Sixth Amendment

Goodman next asserts his client's Sixth Amendment right to counsel as just cause for his refusal to produce records pertaining to his fee arrangements with Natale Richichi. Goodman contends that if forced to produce the documents sought by the grand jury, he may become a

witness against his client in later proceedings, creating a conflict of interest requiring him to withdraw.[5]

The district court rejected Goodman,s arguments because it concluded that Natale Richichi's Sixth Amendment right to counsel has not yet "attached " with respect to matters under investigation, as to which no indictment had been returned, citing Kirby v. Illinois, 406 U.S. 682, 688 (1972). By so concluding, the district court incorrectly implied that the government can interfere with impunity in the attorney-client relationship before the right to counsel "attaches' under the Kirby test. Supreme Court cases regarding timing of a criminal defendant's confession and attachment of the right to counsel, see, e.g., id.; Moran v. Burbine, 475, U.S. 412, 429-30 (1986), are inapposite and misleading in the context of this case. The Sixth Amendment can apply when the government's conduct occurs pre-indictment. Therefore, the problem with Goodman's challenge is not the applicability of the Sixth Amendment.

Rather, the problem with Goodman's challenge is that it is premature and speculative, See Tornay v. United States, 840 F.2d 1424, 1429-30 (9th Cir. 1988) (noting that the government might indict or use the requested information, or might present it without counsel's testimony, and finding no evidence that the government was attempting to disqualify counsel). "It is clear that government interference with a defendant's relationship with his attorney may render counsel's assistance so ineffective as to violate his Sixth

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[5] Goodman and amici curiae, the National Association of Criminal Defense Lawyers and California Attorneys for Criminal Justice, argue that by permitting the government to use grand jury subpoena powers to compel an attorney to disclose certain information, the court is essentially permitting the government to disqualify and violating the client's right to counsel of choice

Amendment right to counsel...." United States v. Irwin 612 F. 2d 1182, 1185 (9th Cir. 1990).

Nevertheless, Goodman has not shown that the grand jury subpoena was issued for an improper purpose such as harassment or other prosecutorial abuse. See Tornay, 840 F. 2d at 1430. Nor has he shown that compliance will create an actual conflict between him and his client, Natale Richichi, that interferes with their attorney-client relationship. See id. It is not clear that (after the right to counsel "attaches") Goodman will ever be required to testify against his client or that he will need to withdraw his representation.

This is especially true for two reasons. First, the government used a subpoena duces tecum, directed to Goodman's law firm, not to Goodman personally. Goodman does not need to make a personal appearance, let alone testify -- even a bookkeeper can turn over records. Second, the government assured the district court that it does not intend to do anything that would force Goodman to withdraw and that it would be willing to resolve the dispute by stipulation if necessary.

Goodman should have informed his client in advance that fee information is generally unprotected. Having failed to do so, Goodman cannot instead rely on the Sixth Amendment to right to counsel as a basis for refusing to produce the fee records. See Tornay, 840 F.2d at 1429-30.

Attorney-Client Privilege

Finally, Goodman asserts that compliance with the grand jury subpoena will interfere with the attorney-client privilege. Goodman contends that the information sought by the grand jury -- records pertaining to any fee arrangements between Goodman and Richichi -- are privileged information

because they would supply the last link for a possible conspiracy indictment under United States v. Klein, 247 F.2d 908 (2d Cir. 1957), cert denied, 355 U.S. 924 (1958). This contention is without merit.

"The purpose of the attorney-client privilege is to protect every person's right to confide in counsel free from apprehension of disclosure of confidential communications." In re Osterhoudt, 722 F. 2d 591, 593 (9th Cir.1983) (per curiam) (citing Baird v. Koerner,279 F. 2d 623, 629-30 (9th Cir. 1960)). Information regarding the fee arrangement is ordinarily not part of the subject matter of the professional consulting and therefore is not privileged communication even though it may evidence wrongdoing by the client." See In re Osterhoudt, 722 F. 2d 591,592 (9th Cir. 1980).

Here the grand jury seeks to know only the amount of money Goodman received, the dates, and where the money came from. The government concedes in its brief that, to the extend the records contain confidential communications in addition to unprotected fee information, they can be redacted to protect the confidential information.

Nevertheless, the identity of the client and the fee arrangements made between attorney and client will be considered privileged where the disclosure of that information is "màterial only for the purpose of showing an acknowledgment of guilt on the part of such client of the very offense on account of which the attorney was employed." Baird, 279 F. 2d at 633; see also In re Michaelson, 511 F. 2d 882, 888 (9th Cir.), cert denied, 421 U.S.987 (1975).[6]

---

[6] Three major exceptions to this general principle have arisen among the various circuits. They are the "last link" exception, the "legal advice" exception and the "confidential communication" exception. See In re

Here, Goodman argues that Richichi initially sought legal advice from Goodman regarding his Nevada and Florida indictments. Goodman asserts that he later undertook representation of Richichi in the present grand jury investigation of a possible conspiracy to defraud the United States and to impede the administration of internal revenue laws under Klein.

Goodman's argument is predicated on the assumption that the privilege applies whenever evidence regarding the fees paid to the attorney would implicate the client in a criminal offense for which the client sought the attorney's legal service. But see In re Osterhoudt, 722 F. 2d at 592-93. This argument must fail.

The fact that Richichi retained Goodman to represent him in the grand jury investigation of a possible Klein conspiracy does not in and of itself reveal any confidential communication. See Baird, 279 F. 2d at 632. Furthermore, even if the records pertaining to the fee agreements between Richichi and Goodman evidenced some wrongdoing by Richichi, it does not automatically become privileged. See Sherman 627 F. 2d at 191-92. Moreover, assuming Goodman could argue that the fee arrangement information was privileged, he presented no records or information to the district court in its in-camera hearing supporting his theory that production of fee records would provide the essence of any confidential communication. See In re Osterhoudt, 722 F. 2d at 563; see also United States v. Brown, 918 F.2d, 84 (9th Cir.1990).

Grand Jury (Anderson). 906 F.2d 1485 (10th Cir. 1990) (detailed analysis of each exception). Goodman's argument is based on all three exceptions, referred to collectively as the "last-link" doctrine.

Accordingly, Goodman cannot validly assert the attorney-client privilege as just cause for his refusal to comply with the grand jury subpoena. See id. The district court did not abuse its discretion in holding Goodman in contempt of court.

AFFIRMED

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NEVADA
FEDERAL LOCAL COURT RULES

(AMENDED 2-1-92)

Rule 120. Attorneys-Admission To Practice-Standards of Conduct-Law Students.

9. *Ethical Standards, disbarment, suspension and Discipline.*

(a) The standards of conduct of any attorney admitted to practice pursuant to any subsection of Rule 120 of these Rules shall be those prescribed by the Code of Professional Responsibility and the Model Rules of Professional Conduct as may be adopted from time to time by the Supreme Court of Nevada except as such may be modified by this court. Any member of the bar of this court who violates the aforementioned standards of conduct may be disbarred, suspended from practice for a definite time, reprimanded or subjected to such other discipline as the court may deem proper. This subsection is not a restriction on the court's contempt power.(amended 2-1-92)

APPENDIX E

Rule 156.

Confidentiality of information

1. A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in subsection 2 and 3.

2. A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm.

3. A lawyer may reveal such information to the extent the lawyer reasonably believes to be necessary:

(a) to prevent or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's service have been used, but the lawyer shall, where practicable, first make reasonable efforts to persuade the client to take corrective action; or

(b) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which client was involved, or to report to allegations in any proceeding concerning the lawyer's representation of the client.(added 1-27-86, eff 3-28-86)

APPENDIX F
No. 89-1836

In the Supreme Court of the United States
OCTOBER TERM, 1990

DOMINIO P. GENTILE, PETITIONER
v.
STATE BAR OF NEVADA

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER,III
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

STEPHEN J. MARZEN
Assistant to the Solicitor General
JOEL M. GERSHOWITZ
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2317

NOTE:(Page 6 of brief)

Different considerations, however, apply to a lawyer's authority to divulge information relating to a pending proceeding. A lawyer has a professional obligation not to make comments that appear reasonably likely to endanger the fairness of his client's trial.[4] A lawyer is not in the same position as private citizen with respect to the judicial system. Rather, the lawyer has a "fuduciary obligation to the courts." ABA Standards for Criminal Justice, *Fair Trial and Free Press* 82 (1968). The right to regulate attorney comments regarding judicial proceedings is an aspect of the States' broad power to regulate the practice of law, a power that is "especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'" *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 792 (1975); see *In re Primus*, 436 U.S. 412, 422 (1978); *Cohen* v. *Hurley*, 366 U.S. 117, 123-124 (1961) (courts have for centuries possessed authority "over members of the bar, incident of their broad responsibility for keeping the administration of justice and the standards of professional conduct unsullied. * * * [L]awyers must operate * * * as assistants to the court in search of a just solution to disputes.").

NOTE:(PAGE 19 OF BRIEF)

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

WILLIAM C. BRYSON
Depuity Solicitor General

STEPHEN J. MARZEN
Assistant to the Solicitor General

JOEL M. GERSHOWITZ
Attorney

November 1990

APPENDIX G

FILED
JUN 30 1994
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

N RE GRAND JURY PROCEEDINGS	)No. 94-15830
OSCAR B. GOODMAN	)DC: CV-S-94-)312-PMP)Nevada (Las)Vegas)
Witness-Appellant,	)
vs.	)ORDER
UNITED STATES OF AMERICA, Appellee.	)

Before: TANG, PREGERSON and T.G. NELSON, Circuit Judge

Appellant's motion to stay the mandate for 30 days pending application for writ of certiorari is granted. see Ninth Cir. R. 41-1.

Appellee's motion to file the June 22, 1994 motion to expedite the issuance of the mandate and the government's June 28, 1994 reply to appellant's response under seal are granted. The above mentioned motions are ordered filed under seal. Appellee's motion to expedite the issuance of the mandate is denied.

The mandate shall issue immediately upon final disposition of the application for certiorari by the Supreme Court.

(3)

Supreme Court, U.S.
FILED
SEP 2 1994
OFFICE OF THE CLERK

No. 94-34

In the Supreme Court of the United States

OCTOBER TERM, 1994

OSCAR B. GOODMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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16 pp

QUESTION PRESENTED

Whether the district court properly denied petitioner's motion to quash a grand jury subpoena requiring petitioner's law firm to produce records of fee information relating to a client.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 8a-15a) is unpublished, but the judgment is noted at 26 F.3d 130 (Table).

JURISDICTION

The judgment of the court of appeals was entered on June 13, 1994. The petition for a writ of certiorari was filed on July 5, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A federal grand jury issued a subpoena to petitioner's law firm for documents relating to fee arrangements between the firm and one of its clients. After petitioner

refused, on behalf of the firm, to comply with an order entered by the United States District Court for the District of Nevada requiring production of the subpoenaed documents, he was held in civil contempt. C.A. E.R. 68-73.[1] The court of appeals affirmed. Pet. App. 8a-15a.

1. During 1993, a special federal grand jury in the District of Nevada was investigating possible violations of federal law by Natale Richichi and others. In February 1993, Richichi was arrested on an indictment returned by a different federal grand jury in the District of Nevada. The indictment charged Richichi with conspiring to bribe a union official. Richichi retained petitioner to represent him on that charge. Gov't C.A. Br. 2, 4.

On December 6, 1993, petitioner's law firm, Goodman & Chesnoff, was served with a document subpoena issued by the special grand jury. The subpoena required the firm to produce documents relating to the fee arrangements governing the firms' representation of Richichi and four of his relatives from February 1, 1993, to the date of the subpoena. Pet. App. 3a; Gov't C.A. Br. 3. Specifically, the subpoena sought production of "[a]ny and all records of any form of payment," including "retainer agreements; all billings; the date(s), amount(s), and means of all payments received; the identity of the person(s) or entities making the payments; and copies of *all* checks, money orders, and/or cashier's checks used to make the payments." C.A. E.R. 6; see Pet. App. 1a.

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[1] We cite to the version of the district court order reproduced in the Excerpts of Record filed in the court of appeals because that order is not reproduced fully or accurately in petitioner's appendix. Pet. App. 3a-7a.

On March 22, 1994, after several extensions of the compliance date, petitioner appeared before the grand jury on behalf of the firm. He refused to produce the subpoenaed documents or to acknowledge their existence. He argued that compelling his firm to comply with the subpoena would violate his Eighth Amendment rights and Richichi's Sixth Amendment right to counsel. Petitioner's Eighth Amendment argument was based on the fact that the IRS was investigating the firm because of its failure to complete an IRS Form 8300 for the legal fees paid in cash to the firm for its representation of Richichi.[2] Petitioner contended that if the subpoenaed documents revealed that he had not completed the form, and if the IRS imposed a civil fine upon petitioner for his failure to do so, the fine would violate the Eighth Amendment's proscription of excessive fines. Pet. App. 4a; Gov't C.A. Br. 3.

The government filed a motion in the district court for an order to show cause why the firm should not be required to comply with the subpoena. At a hearing on the motion on April 19, 1994, petitioner agreed to produce one document concerning a pledge of real estate by one of Richichi's relatives to secure payment of Richichi's legal fees. Petitioner also represented that the firm had no records of any payment or fee arrangement relating to the firm's representation of Richichi's relatives. Petitioner, however, continued to refuse to produce any other records of fee information relating to the law

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[2] An IRS Form 8300 must be completed by "[a]ny person" who is "engaged in a trade or business" and "who, in the course of such trade or business, receives more than $10,000 in cash in 1 transaction (or 2 or more related transactions)." 26 U.S.C. 6050I(a); see Pet. App. 10a n.4.

firm's representation of Richichi. Pet. App. 4a; Gov't C.A. Br. 4-5.

2. On April 26, 1994, the district court ordered the law firm to comply with the grand jury subpoena with respect to fee information concerning its representation of Richichi. Pet. App. 3a-7a; C.A. E.R. 68-73. The court determined that "[w]hether the Eighth Amendment protects [petitioner] from penalties the IRS may seek to impose for failing to fully comply with Form 8300 requirements is an issue unrelated to whether [petitioner] must comply with the Grand Jury's subpoena." C.A. E.R. 70. It accordingly held that "the Eighth Amendment is not implicated by the subpoena." *Ibid.*

The court further held that the subpoena did not violate Richichi's Sixth Amendment right to counsel. C.A. E.R. 70-71. The court reasoned that the subpoena did not affect Richichi's right to counsel in the pending bribery prosecution, because the government had represented that the investigation of the special grand jury that issued the subpoena was not related to the bribery charge. *Id.* at 71. Moreover, in the court's view, Richichi could not claim a Sixth Amendment right with respect to any offenses under investigation by the special grand jury until formal adversary criminal proceedings were commenced against him based on those offenses. *Ibid.*

Finally, the court rejected petitioner's claim that the subpoena sought information protected by the attorney-client privilege. C.A. E.R. 71-72. The court found that petitioner "has not demonstrated the existence of exceptional circumstances that might compel this Court to apply the last link doctrine, nor is there anything in the circumstances of this case to suggest that the information sought by the Government 'would in any way convey the substance of confidential professional

communications.'" *Id.* at 72 (footnote and citation omitted).

On May 3, 1994, petitioner reappeared before the grand jury and again refused to comply with the subpoena. After a hearing on May 13, 1994, the district court held petitioner in civil contempt but stayed its order pending petitioner's appeal. Gov't C.A. Br. 5.[3]

3. The court of appeals affirmed the civil contempt order entered against petitioner. Pet. App. 8a-15a. It first held that the grand jury subpoena did not violate petitioner's Eighth Amendment rights. *Id.* at 9a-11a. It reasoned that compliance with the subpoena could not reveal that petitioner had not properly completed the IRS Form 8300 for Richichi's fees, because "the IRS [was] already aware that [petitioner] failed to entirely complete" the form. *Id.* at 10a. The court also rejected petitioner's argument that compliance with the subpoena would waive his Eighth Amendment claim. *Id.* at 10a-11a.

The court of appeals further held that the subpoena did not violate Richichi's Sixth Amendment rights. Pet. App. 11a-13a. The court stated that the government cannot "interfere with impunity in the attorney-client relationship before the right to counsel 'attaches' under [*Kirby* v. *Illinois*, 406 U.S. 682 (1972)]." Pet. App. 12a. It thus rejected the district court's view that the Sixth Amendment was inapplicable to the special grand jury's investigation. *Ibid.* The court of appeals determined, however, that petitioner's Sixth Amendment claim was "premature and speculative." *Ibid.* The court explained

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[3] Two days before he was held in contempt, petitioner appeared on Natale Richichi's behalf at an initial appearance on a second indictment returned by a federal grand jury in the Southern District of Florida charging Richichi with racketeering, mail fraud, and extortion. Gov't C.A. Br. 4.

that petitioner had not shown "that the grand jury subpoena was issued for an improper purpose such as harassment or other prosecutorial abuse" or that "compliance will create an actual conflict between him and his client, Natale Richichi, that interferes with their attorney-client relationship." *Id.* at 12a-13a.[4]

The court of appeals rejected petitioner's argument that the grand jury subpoena interfered with the attorney-client privilege. Pet. App. 13a-15a. The court observed that that privilege ordinarily does not protect "[i]nformation regarding the fee arrangement" between an attorney and his client. *Id.* at 14a. The privilege would not attach here, the court stated, "even if the records pertaining to the fee arrangements between Richichi and [petitioner] evidenced some wrongdoing by Richichi." *Id.* at 15a. Instead, the court determined, the fee records would be privileged only if their disclosure would "in and of itself reveal [a] confidential communication." *Ibid.* Petitioner's claim of privilege thus failed, the court held, because he "presented no records or information to the district court in its in-camera hearing supporting his theory that production of fee records would provide the essence of any confidential communication." *Ibid.*

ARGUMENT

1. Petitioner first contends (Pet. 5-10) that he was precluded from complying with the grand jury subpoena by a state ethical rule that has been adopted in the

[4] The court of appeals also noted that petitioner "should have informed his client in advance that fee information is generally unprotected." Pet. App. 13a. "Having failed to do so," the court concluded that petitioner "cannot instead rely on the Sixth Amendment right to counsel as a basis for refusing to produce the fee records." *Ibid.*

District of Nevada. Petitioner did not present that claim in the court of appeals, however, and the court of appeals did not address it. "Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); see also, *e.g.*, *Berkemer* v. *McCarty*, 468 U.S. 420, 443 (1984); *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U.S. 752, 760 n.6 (1984).

In any event, petitioner's claim does not merit further review. Petitioner's claim rests (Pet. 7, 10) on Rule 156 of the Nevada Supreme Court Rules. That rule provides that, with exceptions not pertinent here, "[a] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation." See Pet. App. 17a. The Ninth Circuit has construed that rule not to forbid a lawyer from disclosing client fee information pursuant to a grand jury subpoena. *In re Grand Jury Proceedings (Chesnoff)*, 13 F.3d 1293, 1297 (1994) (relying on Rule 1.6 of the Model Rules of Professional Conduct (1983)). Petitioner does not even cite the Ninth Circuit's decision, much less offer contrary authority.

2. Petitioner renews his contention (Pet. 10-18) that compliance with the grand jury subpoena will interfere with the attorney-client privilege. The court of appeals correctly rejected that contention. Pet. App. 13a-15a.

First, there is no support for petitioner's broad argument (Pet. 12-13) that information about a client's fee arrangements with his or her attorney is generally protected by the attorney-client privilege because its disclosure reveals that the client has hired a lawyer. See generally *Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981); *Fisher* v. *United States*, 425 U.S. 391, 403 (1976). To the contrary, it is well settled that fee

information ordinarily is not protected by the privilege. See, *e.g.*, *United States* v. *Ritchie*, 15 F.3d 592, 602 (6th Cir. 1994), petition for cert. pending, No. 94-50; *United States* v. *Leventhal*, 961 F.2d 936, 940 (11th Cir. 1992); *United States* v. *Goldberger & Dubin, P.C.*, 935 F.2d 501, 504-505 (2d Cir. 1991); *In re Grand Jury Proceeding (Cherney)*, 898 F.2d 565, 567 (7th Cir. 1990); *In re Grand Jury Subpoena Served Upon Doe*, 781 F.2d 238, 247-248 (2d Cir.) (en banc), cert. denied, 475 U.S. 1108 (1986).

There is likewise no support for petitioner's argument (Pet. 10-12) that client fee information is privileged if its disclosure would tend to incriminate the client in the matter for which legal advice has been sought.[5] Rather,

[5] Petitioner for the first time makes the related argument (Pet. 13-18) that the subpoena should have been quashed solely because of its timing. "The only time any of the circuits have been willing to quash a subpoena * * * is when the timing of the subpoena amounted to harassment or interference with trial preparation." *In re Grand Jury Subpoenas*, 906 F.2d 1485, 1494 (10th Cir. 1990). Petitioner cannot establish either of those grounds. The Ninth Circuit correctly determined that petitioner "has not shown that the grand jury subpoena was issued for an improper purpose such as harassment." Pet. App. 12a. Moreover, petitioner has not alleged that compliance with the subpoena would have interfered with his preparation for any trial of Richichi, nor could he do so. The government represented to the district court in this case that the client fee information described in the grand jury subpoena is being sought only in connection with the offenses under investigation, and not in connection with the bribery offense with which Richichi has been charged (Gov't C.A. Br. 4); the district court accepted that representation (C.A. E.R. 71). Although petitioner has argued that compliance with the subpoena could require him to become a witness against Richichi, the court of appeals rejected that argument. Pet. App. 13a. Thus, although petitioner did not raise his timing argument below, the courts below determined that petitioner cannot establish the grounds

the courts of appeals have uniformly held that fee information is privileged only if its disclosure would itself reveal a confidential communication. See *In re Grand Jury Proceedings (GJ90-2)*, 946 F.2d 746, 748 (11th Cir. 1991); *In re Grand Jury Matter*, 926 F.2d 348, 351-352 (4th Cir. 1991); *In re Grand Jury Subpoena for Attorney Representing Criminal Defendant Reyes-Requena*, 926 F.2d 1423, 1431 (5th Cir. 1991); *In re Grand Jury Subpoena for Attorney Representing Criminal Defendant Reyes-Requena*, 913 F.2d 1118, 1125 n.11 (5th Cir. 1990), cert. denied, 499 U.S. 959 (1991); *In re Grand Jury Subpoenas*, 906 F.2d 1485, 1491-1492 (10th Cir. 1990); *In re Grand Jury Proceedings 88-9 (MIA)*, 899 F.2d 1039, 1043 (11th Cir. 1990); *Tornay* v. *United States*, 840 F.2d 1424, 1428 (9th Cir. 1988); *In re Shargel*, 742 F.2d 61, 62 n.2, 63-64 (2d Cir. 1984); *United States* v. *Liebman*, 742 F.2d 807, 810 (3d Cir. 1984); *In re Witnesses Before the Special March 1980 Grand Jury*, 729 F.2d 489, 493-495 (7th Cir. 1984); *In re Grand Jury Investigation No. 83-2-35*, 723 F.2d 447, 453 (6th Cir. 1983), cert. denied, 467 U.S. 1246 (1984); *In re Osterhoudt*, 722 F.2d 591, 593 (9th Cir. 1983).[6]

Petitioner has not shown and cannot show that the grand jury subpoena sought information that, if disclosed, would reveal a confidential communication protected by the privilege. The subpoena sought only

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necessary to support such an argument. Those factbound determinations do not warrant further review.

[6] Any support petitioner's position might once have derived from the Ninth Circuit's decisions in *United States* v. *Hodge & Zweig*, 548 F.2d 1347, 1355 (1977), and *Baird* v. *Koerner*, 279 F.2d 623, 635 (1960), has been eliminated by the Ninth Circuit's subsequent decisions in *Tornay* v. *United States*, *supra*, and *In re Osterhoudt*, *supra*, cited in the text. See also *In re Grand Jury Subpoenas (Hirsch)*, 803 F.2d 493, 496-498 (9th Cir. 1986).

records of the amount of the fees that petitioner received, the dates on which the fees were received, and the source of the fees. As the court of appeals noted (Pet. App. 14a), the government said that it would allow petitioner to redact any portion of the fee records that constituted a privileged communication. See Gov't C.A. Br. 19. As the court of appeals also noted, petitioner "presented no records or information to the district court in its in-camera hearing supporting his theory that production of fee records would provide the essence of any confidential communication." Pet. App. 15a. Because petitioner failed to show that production of the client fee information would reveal any privileged communication from his client, the court of appeals correctly concluded that the information is not protected by the attorney-client privilege.

3. Finally, petitioner renews his contention (Pet. 18-21) that compliance with the grand jury subpoena would violate his Eighth Amendment rights. He argues that disclosure of the client fee information to the grand jury may result in fines by the IRS for his failure fully to complete IRS Form 8300, and that those fines would violate the Eighth Amendment's proscription of "excessive fines." That argument is insubstantial. Contrary to petitioner's suggestion (Pet. 20), the Eighth Amendment does not create a "privilege" against the disclosure of client fee information to a grand jury, even if that disclosure would lead to the imposition of an unconstitutionally excessive fine. See *Ingraham* v. *Wright*, 430 U.S. 651, 671 n.40 (1977); see also *United States* v. *Lovett*, 328 U.S. 303, 317-318 (1946). As the courts below correctly recognized, the Eighth Amendment provides a basis for challenging a fine only after it has been imposed. Pet. App. 10a; C.A. E.R. 70. Petitioner

therefore cannot invoke the Eighth Amendment to avoid compliance with the grand jury subpoena. Pet. App. 10a.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1994

[7] The cases upon which petitioner relies (Pet. 20-21) are inapposite. In *Minnesota* v. *Murphy*, 465 U.S. 420, 429-434 (1984), this Court held that a probationer's incriminating responses to questions during a probation interview may be used against him if he does not assert his Fifth Amendment privilege against compulsory self-incrimination and if he does not face a revocation of his probation for refusing to answer the questions. In *Austin* v. *United States*, 113 S. Ct. 2801, 2811-2812 (1993), the Court concluded that the Eighth Amendment Excessive Fines Clause applies to the civil forfeiture provisions in 21 U.S.C. 881(a)(4) and (a)(7) because those provisions constituted punishment for Eighth Amendment purposes. And in *Department of Revenue of Montana* v. *Kurth Ranch*, 114 S. Ct. 1937, 1947 (1994), the Court held that a tax on the possession of dangerous drugs, conditioned on commission of a crime, constituted punishment for double jeopardy purposes.